Duquesne Law Review

Volume 15 | Number 3 Article 3

1977

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Volume 15, Number 3, Spring 1977

The 402A Defendant and the Negligent Actor

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As product liability cases come to comprise a growing portion of personal injury actions, and as an increasing number of product liability cases are determined by section 402A of the Restatement (Second) of Torts,[1] it becomes increasingly important to examine the legal relationships between the 402A defendant and the negligent actor, whether the negligent actor be the plaintiff, a third-party defendant, or a codefendant, and to determine what those relationships are or should be.

An ideal starting point for such an examination is *Rhoads v. Ford Motor Co.*[2] The plaintiff, Woodrow Rhoads, suffered personal injuries when his car veered off the road, struck a guard rail, and overturned. His wife, a passenger in the car driven by Rhoads, died. In his individual capacity, Rhoads sued the manufacturer of the automobile, Ford Motor Company, under section 402A, alleging a dan-

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1. Section 402A states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

2. 374 F. Supp. 1317 (W.D. Pa. 1974), *aff'd on other grounds*, 514 F.2d 931 (3d Cir. 1975).

gerous defect in the steering mechanism of the car. He also brought an action under the state's wrongful death and survival statutes as administrator of his wife's estate. Ford joined Rhoads, individually, as a third-party defendant.[3] The jury returned special verdicts finding a "dangerously defective condition of the vehicle"[4] in existence at the time Ford sold the car and negligence on the part of Rhoads in operating the vehicle.[5]

The court entered judgments for the plaintiff and against the defendant in the amounts determined by the jury, and, in the third-party action, the court entered judgment for the third-party defendant. Ford then moved to vacate the judgments in the personal injury and wrongful death and survival actions on the ground "that the negligence of Rhoads bars recovery by him, either individually or as representative of his deceased wife and her survivors"[6] or, alternatively, to have contribution from Rhoads as third-party defendant for one-half of the damages awarded to the estate of Mary Matthews under the survival statute and one-half of the damages in favor of her survivors under the wrongful death statute.[7]

The federal district court, mindful of its *Erie* obligation in this diversity case, looked to opinions of the Supreme Court of Pennsylvania for guidance in resolving the issues presented by Ford's motions. The district court found that, while "the road to [the] resolution [of those issues] has not been clearly charted, . . . the pronouncements of the Supreme Court of Pennsylvania have set sufficient guideposts leading to the right of a negligent user to recover his own damages as well as his responsibility vel non to share with the seller of a dangerously defective product the damages accruing to a third person from their concurrent causation."[8] Those "guideposts" led the court to deny both of Ford's motions upon the conclusions that contributory negligence of the plaintiff did not bar his recovery from a 402A defendant[9] and that the 402A defendant

3. 374 F. Supp. at 1318.
4. *Id.*
5. *Id.*
6. *Id.* at 1319.
7. *Id.*
8. *Id.*
9. That educated judicial guess by the district court that the Supreme Court of Pennsylvania would deny the contributory negligence defense to a 402A defendant has proven to be accurate: "Today, we complete our acceptance of the principles delineated in comment *n* by rejecting contributory negligence as an available defense in 402A cases." McCown v. International Harvester Co., 463 Pa. 13, 15-16, 342 A.2d 381, 382 (1975).

was not entitled to contribution from a negligent actor with regard to a third person's injuries or death.[10]

On appeal, Judge Aldisert, writing for the Third Circuit, determined that there had been insufficient evidence of Mr. Rhoads' alleged negligence to justify submitting that issue to the jury. For that reason, the judgments were affirmed and it was "unnecessary to reach [Ford's] arguments that the contributory negligence of a driver (1) would bar recovery under Section 402A, or (2) entitle the manufacturer of a defective product to contribution."[11]

It is, of course, a basic tenet of appellate judicial practice that the gratuitous resolution of legal issues should be avoided, particularly when the court is exercising diversity jurisdiction and the decisions of the highest appellate court of the state whose law is applicable have not explicitly resolved those issues. Consequently, Judge Aldisert's judicial restraint in *Rhoads* was ideally suited to the case. Yet the specific issues mooted in *Rhoads* possess such continuing potential significance that it is equally appropriate to confront and attempt to resolve Ford's arguments, assuming that there had been sufficient evidence of Mr. Rhoads' negligence.

Should the defense of contributory negligence be available to the 402A defendant? The answer seems fairly apparent, pursuant to the law of Pennsylvania[12] and to the law of nearly all the other states which have embraced 402A.[13] Indeed, Comment n to 402A seems to provide the answer:

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10. Apparently, the Supreme Court of Pennsylvania has not yet definitively resolved this issue. The determination by the district court in *Rhoads* that the 402A defendant is not entitled to contribution from the negligent actor was achieved in an earlier diversity case in which Pennsylvania law was applicable. Fenton v. McCrory Corp., 47 F.R.D. 260 (W.D. Pa. 1969). The contrary result has been achieved in diversity cases applying Pennsylvania law in Wojciechowski v. Long-Airdox Div. of Marmon Group, Inc., 488 F.2d 1111 (3d Cir. 1973); Chamberlain v. Carborundum Co., 485 F.2d 31 (3d Cir. 1973); Judd v. General Motors Corp., 65 F.R.D. 612 (M.D. Pa. 1974); Walters v. Hiab Hydraulics, Inc., 356 F. Supp. 1000 (M.D. Pa. 1973). In *Walters*, the court said: "The underlying policy of § 402A is in no way diluted by the right of the strictly liable seller or manufacturer to obtain contribution from a third party whose negligence was a proximate cause of the injury." 356 F. Supp. at 1003. It seems to me that the conduct-regulating function of 402A is diluted by the precise amount of contribution the 402A defendant receives from the third-party defendant. For an examination of some of the conflicting opinions of diversity courts applying Pennsylvania law, see 2 HOFSTRA L. REV. 845 (1974).

11. 514 F.2d at 935.

12. *See* note 9 *supra*.

13. "The overwhelming majority of decisions have been in accord with the *Restatement (Second) of Torts*, holding that contributory negligence, in the sense of failure to discover a defect in the product or guard against the possibility of existence, is not a defense." W.

> Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.[14]

It must be conceded that the rationale expressed in Comment n is nearly as mechanistic as it is apparent: since negligence on the part of the 402A defendant is irrelevant, so too is contributory negligence on the part of the plaintiff. Presumably, however, the reasons for that rule have a more significant foundation. In *Rhoads*, the district court noted that

> § 402A imposes upon the marketer of goods the burden of reparation for damages brought about by a defectively dangerous condition of his product. Whether this liability—manifestly a consumer-production measure—is based upon the

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PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 804 n.2 (6th ed. 1976) (hereinafter cited as PROSSER & WADE] (citations omitted). New York, apparently, is a notable exception. *See* Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973). For a penetrating analysis of *Codling* and subsequent cases decided by the New York Court of Appeals see Twerski, *From Codling, to Bolm to Velez: Triptych of Confusion*, 2 HOFSTRA L. REV. 489 (1974).

14. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). Section 524, referred to in 402A, reads as follows:

> (1) A plaintiff is not barred from recovery for harm done by the miscarriage of an ultrahazardous activity caused by his failure to exercise reasonable care to observe the fact that the activity is being carried on or by intentionally coming into the area which would be endangered by its miscarriage.
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> (2) A plaintiff is barred from recovery for harm caused by the miscarriage of an ultrahazardous activity if, but only if,
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> (a) he intentionally or negligently causes the activity to miscarry, or
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> (b) after knowledge that it has miscarried or is about to miscarry, he fails to exercise reasonable care to avoid harm threatened thereby.

RESTATEMENT OF TORTS § 524 (1938).

> unequal risk-bearing ability between seller and user or the seller's superior expertise and opportunity to ameliorate the risk of harm, it must be treated as a social-policy principle in which the seller-protector and the protected user are not *in aequali juri*.[15]

That language implies that the 402A defendant is uniquely capable of diminishing or eliminating the risk of injury in his product. The strict liability imposed by 402A suggests that the sting of liability (even absent negligence) is one stimulus intended to motivate the marketer to utilize that capacity. Were plaintiff's contributory negligence a bar to recovery, that underlying purpose of 402A would be frustrated. Consequently, disallowing the defense of contributory negligence seems wholly consistent with the purposes of that section.

An imperfect but conceivably enlightening analogy comes to mind. In those negligence actions in which the defendant's liability is predicated upon his violation of a criminal statute, the court, in determining the applicability of the criminal statute to the negligence action before it, will ask two questions: Was plaintiff within the class of persons intended to be protected by the statute? Was the peril which occasioned the injury one which the statute was intended to protect against?[16] If the court answers both questions affirmatively, the criminal statute may become the standard by which defendant's conduct is to be judged. Even so, however, defendant is likely to retain the contributory negligence defense. In order to deny defendant that defense, plaintiff will be required to persuade the court that, not only was plaintiff within the legislatively

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15. 374 F. Supp. at 1319. That excerpt from the district court's opinion is, I believe, a succinct reflection of RESTATEMENT (SECOND) OF TORTS § 402A, Comment c:

> On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

16. Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543 (1889); RESTATEMENT (SECOND) OF TORTS § 286 (1965).

protected class, but, as well, the legislature intended to protect the class from its inability to exercise self-protective care.[17] Should the court be so persuaded, it will deny defendant the defense on the ground that to do otherwise would frustrate the legislative intent.[18]

It is true, of course, that 402A is not a legislative enactment; it becomes a part of the common law of the state when adopted by the highest appellate court. However, that adoption may evidence a judicial intention as apparent as the legislative intent underlying a criminal statute. The court in *Rhoads* determined that a significant purpose underlying the adoption of 402A was to stimulate the seller to utilize its superior ability and opportunity to ameliorate the risk of harm for the benefit of the protected user.[19] Indeed, that conduct-regulating purpose is deemed so significant that 402A liability may be imposed "although the seller has exercised all possible care in the preparation and sale of his product."[20]

It is also true that the plaintiff in a 402A action is not likely to be under a personal disability such as minority or intoxication; however, when compared with the product marketer, and its

17. RESTATEMENT OF TORTS § 483 (1934); *see* RESTATEMENT (SECOND) OF TORTS § 483 (1965).

18. For example, in Zerby v. Warren, 297 Minn. 134, 210 N.W.2d 58 (1973), defendant's employee, in violation of a "glue sniffing" statute, sold two pints of glue containing toluene to a 13-year-old who then sniffed the glue with a 14-year-old friend. As a result of injurious consequences to his central nervous system, the 14-year-old drowned. In a wrongful death action, defendant asserted that decedent had been contributorily negligent; indeed, defendant's conduct violated a related statute which prohibited minors from using and possessing such glue. The court, however, noted: "The obvious legislative purpose of [the statute violated by the defendant] is to protect minors unable to exercise self-protective care from harm resulting from sniffing the fumes of glue." Thus, if the contributory negligence defense "were permitted, the evident purpose of such statutes would be defeated." *Id.* at 140, 210 N.W.2d at 62.

In Majors v. Brodhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965), defendant liquor licensee, in violation of a statute, sold liquor to the plaintiff when he was visibly intoxicated. As a consequence, plaintiff created a commotion in the men's bathroom on the sixth floor of defendant's hotel and was confined there. Plaintiff managed to crawl through the bathroom window onto a roof ledge, then either fell or jumped 45 feet and was injured. In rejecting the defense of contributory negligence, the court quoted from RESTATEMENT OF TORTS § 483 (1934): "If the defendant's negligence consists in the violation of a statute enacted to protect a class of persons from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery for bodily harm caused by the violation of such statute." *Id.* at 269, 205 A.2d at 876. *See also* Schelin v. Goldberg, 188 Pa. Super. Ct. 341, 348, 146 A.2d 648, 652 (1958) (statute involved in *Majors* was enacted specifically to protect intoxicated persons from their inability to exercise self-protective care).

19. *See* text at note 15 *supra*.

20. *See* note 1 *supra*.

"superior expertise and opportunity to ameliorate the risk of harm," the "protected user" is indeed under a disability. He lacks the marketer's capacity to design, manufacture, and market a defect-free product. As between the two parties, the plaintiff is very much a member of a class unable to exercise self-protective care and one, therefore, to be protected by the possessor of the "superior expertise," the 402A defendant. Consequently, the criminal statute cases tend to corroborate the conclusion that the defense of contributory negligence to the 402A defendant is inconsistent with the conduct-regulating function of that section.[21]

May the same assertion be made with respect to those jurisdictions having comparative negligence statutes or judicially fashioned comparative negligence rules?[22] Historically, the answer would seem to be yes. Certainly a number of comparative negligence statutes[23] antedated the formulation of 402A and its Comment n. Presumably, the drafters of the section and that comment were cognizant of those statutes, yet there is no caveat to Comment n preserving the contributory negligence defense in those comparative negligence jurisdictions which might embrace 402A. Moreover, in product liability cases which antedated the adoption of 402A and were based on a breach of warranty, contributory negligence was generally unavailable as a defense[24] even in those jurisdictions having comparative

21. Professor Victor E. Schwartz has characterized the Restatement position denying the 402A defendant the contributory negligence defense as "a rule in search of a rationale." V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 12.6 (1974) [hereinafter cited as SCHWARTZ]. I believe that the conduct-regulating function of 402A provides an appropriate rationale for the rule. Perhaps in part because he finds no adequate rationale for the rule, Professor Schwartz would have comparative negligence statutes reduce the recoveries of contributorily negligent plaintiffs from 402A defendants. *Id.* at §§ 12.1-.7. Because I think such reduction would dilute the conduct-regulating function, I would conclude otherwise. *See* text at note 22 *infra*.

22. Alaska, California, and Florida have judicially fashioned comparative negligence rules. *See* Kaatz v. State, 540 P.2d 1037 (Alas. 1975); Nga Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 143 (Fla. 1973).

23. When § 402A was adopted on May 22, 1964, half a dozen states had comparative negligence statutes. SCHWARTZ, *supra* note 21, at app. A 367-69. "In the mid 1960's only six states had a general comparative negligence system. . . . From 1965 through 1975 at least 25 states turned to such a law." PROSSER & WADE, *supra* note 13, at 608. Pennsylvania recently enacted a comparative negligence statute. PA. STAT. ANN. tit. 17, §§ 2101-2102 (Purdon Supp. 1977-1978).

24. One authority has concluded:

> Nearly all of the decisions [on the availability of the contributory negligence defense] have involved warranty, either on a direct sale or without privity. It has been said very often that contributory negligence is never a defense to the strict liability. It has been said somewhat more often that it is always a defense. The disagreement, however, is a superficial one of language only, and is merely part of the general murk

negligence statutes.[25] Since one of the purposes of 402A was to facilitate recovery in product liability cases by eliminating the potential obstacles imposed by the contract theory of breach of warranty,[26] it seems fair to assume that the unavailability of the contributory negligence defense in warranty actions was intended to continue unaffected by the adoption of 402A's strict liability theory. And there is an apt analogy between the two theories of liability which supports that conclusion in purely mechanical terms: since negligence on the part of the defendant is legally irrelevant in either the warranty action or the 402A action, so, too, should the plaintiff's contributory negligence be deemed legally irrelevant in both actions.

It could be asserted that 402A's purpose of stimulating the marketer to sell a defect-free product through strict liability would be less adversely affected by the contributory negligence defense in comparative negligence jurisdictions. That may be true; but to the extent that plaintiff's contributory negligence diminishes liability, the stimulation on the 402A defendant to produce defect-free prod-

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that has surrounded "warranty." If the substance of the cases is looked to, with due regard to their facts, they fall into an entirely consistent pattern.

> If the plaintiff's negligence consists only in a failure to discover the danger involved in the product, or to take precautions against the possibility of its existence, . . . it is quite clear that it is no defense to the strict liability . . . . On the other hand the kind of negligence which consists of proceeding voluntarily to encounter a known unreasonable danger and which tends to overlap the defense of assumption of risk, will relieve the defendant of liability.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS 670-71 (4th ed. 1971) (citations omitted).

See Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1965), *order modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1966).

25. "[A]fter checking the warranty cases in the comparative negligence jurisdictions and the authorities in the field, it appears that this suggestion [that comparative negligence be applied in warranty actions] has not previously been advanced." Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 652 n.113 (1967). It should be noted that the author of that article favored the application of comparative negligence statutes in warranty actions, as Professor Schwartz does in 402A actions. *See* note 21 *supra*.

In Zerby v. Warren, 297 Minn. 134, 210 N.W.2d 58 (1973), discussed at note 18 *supra*, defendant attempted to avoid the negation of the contributory negligence defense arising out of decedent's inability to exercise self-protective care by asserting the state's comparative negligence statute. The assertion was rejected: "Because there can be no contributory negligence as a matter of law when the statute is designed to protect persons from their inability to protect themselves, the adoption of comparative negligence did not alter the exclusion of defenses." *Id.* at 141, 210 N.W.2d at 63.

26. Prosser, *The Assault Upon the Citadel*, 69 YALE L. J. 1099 (1960).

ucts will likewise be diminished. Consequently, it should be concluded that the contributory negligence defense is unavailable to the 402A defendant whether or not the jurisdiction involved has a comparative negligence rule.

Suppose the plaintiff asserts, and introduces evidence in support of, two theories of liability against the defendant, 402A and negligence. To what extent (if at all) should defendant have available the contributory negligence defense? It seems to me that as to those aspects of negligence related to the design, manufacture, and distribution of the injury-producing product, the defense should be wholly unavailable. Since 402A liability does not require negligence as a condition precedent, rather obviously the negligence of the 402A defendant should not serve either to bar or to diminish the extent of liability. It would be patently anomalous to conclude that the 402A defendant should be denied the contributory negligence defense unless the plaintiff proved that the defendant had negligently marketed a defective and unreasonably dangerous product, in which case the defense would be resurrected. Therefore, whether the defendant's potential liability rests on the application of 402A (irrespective of negligence) or on the negligent marketing of a defective and unreasonably dangerous product, the defendant should be denied the contributory negligence defense.

Even if the 402A defendant is denied the contributory negligence defense, it may still offer evidence which, while tending to impute "fault" to the plaintiff, is properly admissible for some other and legitimate purpose. A difficult task for the trial court in such a case is to determine the precise purpose to be served by the offered evidence and then to admit that fault-implying evidence which serves a legitimate defensive purpose and to exclude that evidence which would serve only to demonstrate contributory negligence. *Melia v. Ford Motor Co.*[27] presented the court with such a chore. In a wrongful death action resulting from an automobile collision in which the decedent was thrown from the car, the plaintiff alleged defective design of the left door latch assembly.[28] At trial, the defendant, Ford Motor Company, offered evidence that (1) decedent had neither locked the door nor utilized the available seat belt and (2) decedent had entered the intersection against a red light. The district court

27. 534 F.2d 795 (8th Cir. 1976).
28. *Id.* at 797.

received the evidence of the unlatched door and unsecured seat belt but excluded the evidence that decedent had driven through a red light. Following a verdict for the plaintiff, Ford appealed, asserting that (1) decedent's failure to use the lock and seat belt constituted a non-contemplatable misuse of the product as a matter of law and (2) the trial court had erred in excluding the evidence regarding the red light. The Eighth Circuit affirmed, finding that decedent's non-use of the lock and seat belt created a factual issue of product misuse which the jury had resolved against Ford; "one cannot say as a matter of law that such conduct of an automobile user was not reasonably foreseeable."[29] Under Nebraska law, applicable to this diversity case, a product misuse not reasonably foreseeable to the seller constituted an available defense but the defense had failed factually. As to the excluded evidence, the court concluded that in Nebraska contributory negligence was not a defense available to the 402A defendant; thus, the district court had not erred in excluding Ford's offered evidence that decedent had run a red light.[30] The trial court had properly distinguished that evidence which, though implying fault on the part of the user, went to a defense legitimately available to the 402A defendant (product misuse) from that evidence which tended to demonstrate only general contributory negligence.

The necessity for making a neat distinction between defensive evidence indicating only general contributory negligence, and therefore not available to the 402A defendant, and evidence which, although implying fault on the part of the plaintiff, remains available to the defendant, arose in regard to a different legal defense in *Orfield v. International Harvester Co.*[31] Plaintiff sought to recover for personal injuries he had sustained while operating a bulldozer manufactured by defendant. Because of the absence of an overhead protective canopy on the bulldozer, plaintiff "was struck in the chest by a fifty foot long black oak tree."[32] Plaintiff alleged that the bulldozer without a canopy constituted a product in a defective condition unreasonably dangerous to the user. The plaintiff, however, testified that he appreciated the danger of operating the vehi-

29. *Id.* at 800.
30. *Id.* at 801.
31. 535 F.2d 959 (6th Cir. 1976).
32. *Id.* at 960.

cle without a canopy guard, that he and other employees had mentioned the protection provided by the safety device to the foreman, and that he operated the bulldozer without the device despite the danger because he was afraid of losing his job.[33] At the close of plaintiff's case, the district court granted defendant's motion for a directed verdict on the ground that, as a matter of law, the bulldozer had not been defective and unreasonably dangerous, and the Sixth Circuit affirmed. Both courts relied on Comment i to 402A, which provides in part:

> The rule stated in this Section [402A] applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.[34]

Both the trial and appellate courts concluded that, even assuming that the bulldozer was defective when it left defendant seller's hands because of the absence of a canopy, the product was not dangerous to an extent beyond that which would be contemplated by the ordinary user or consumer. Apparently, the plaintiff's own testimony helped to persuade both courts to reach that conclusion as a matter of law. Does that mean that plaintiff lost because he was contributorily negligent? No, not legally. Rather, plaintiff lost because the product was not unreasonably dangerous as defined in Comment i and 402A's liability is to be imposed only on the seller of a defective *and* unreasonably dangerous product. Defendant enjoyed a directed verdict not because of fault attributable to the plaintiff but because it had not been guilty of that conduct which 402A treats as liability-generating: the sale of a product in a defective condition unreasonably dangerous to the user or consumer. Had defendant offered evidence indicating only that a reasonable person in plaintiff's circumstances would not have operated the uncanopied bulldozer, that evidence would have been excluded as tending

33. *Id.* The court offers no indication as to whether that conduct on the part of the plaintiff would constitute assumption of the risk as a matter of law. It seems to me that where plaintiff is influenced to act by the economic coercion inherent in his fear of losing his job, his conduct should not be deemed a voluntary acquiescence in a known danger.

34. RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1964).

to prove a defense not available to the 402A defendant, contributory negligence. Instead, plaintiff's evidence indicated (as a matter of law) that the bulldozer did not create a danger beyond the contemplation of the ordinary user or consumer. The distinction may be a fine one[35] but it is legally critical. The trial court recognized that plaintiff's testimony was relevant to a defense legitimately available to the defendant and was for that reason admissible, notwithstanding the fact that it may have implied fault on the part of the plaintiff.

Let's take one more example of a case which may compel a court to distinguish between evidence tending to demonstrate only general contributory negligence, and therefore not admissible in a 402A action, and evidence which, though implying fault on the part of the plaintiff, may be admissible for a legitimate purpose. The plaintiff in *Padgett v. General Motors Corp.*[36] alleged that defects in engine construction caused an automobile in which he was a passenger to go out of control. The accident rendered him a permanent paraplegic. The defendant's case included evidence that both the plaintiff and the driver had been drinking prior to the accident. After a jury verdict for General Motors, the defendant, the plaintiff appealed, asserting error in admitting evidence of the drinking.[37] The Fourth Circuit affirmed; since "evidence of drinking could have been relevant to the perceptive abilities of Padgett and [the driver], both of whom testified about the accident at trial,"[38] in admitting the evidence, the lower court did not abuse its discretion. Although Padgett's alleged drinking is not likely to have imputed legal fault to him since he was a passenger, not a driver, it is appar-

35. Indeed, the Supreme Court of California concluded that the "unreasonably dangerous" requirement constituted such an impelling stimulus toward the reintroduction of the concept of negligence in product liability cases that it negated the requirement. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). In Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975), Chief Justice Jones arrived at the same conclusion. However, "there is a serious question as to whether *Berkebile* is entitled to precedential value [on that point], since only one justice of the Supreme Court of Pennsylvania joined in Chief Justice Jones' opinion. Three other justices concurred only in the result, and two additional justices filed separate concurring opinions based on rationales different from that expressed in Chief Justice Jones' opinion." Zurzolo v. General Motors Corp., 69 F.R.D. 469, 471 (E.D. Pa. 1975); *see* Beron v. Kramer-Trenton Co., 402 F. Supp. 1268 (E.D. Pa. 1975).

36. 544 F.2d 704 (4th Cir. 1976).

37. *Id.* at 705.

38. *Id.*

ent that had he been the driver, evidence of imbibing, even if tending to imply fault, may have been deemed admissible for the limited purpose of impeaching the credibility of litigant-witness.[39] If a court decides, as I think it should, that contributory negligence is a defense not available to the 402A defendant, the court must be continuingly sensitive to the necessity for distinguishing between that offered evidence which indicates only contributory negligence (and is therefore inadmissible) and that evidence which, though implying fault, may be admissible as tending to indicate either a legitimate liability-defeating fact, such as a non-contemplatable misuse of a product which although defective is not unreasonably dangerous, or a matter affecting credibility.

We have concluded that the contributory negligence defense should be unavailable to the 402A defendant whether or not the jurisdiction applies a comparative negligence rule and whether or not defendant's negligence occasioned the marketing of the defective product. The essential rationale for each of those conclusions is the same: to assure that the stimulus to market a defect-free product contemplated by 402A is neither destroyed nor diluted. Is that rationale relevant to determine whether a 402A defendant may have contribution from a negligent actor as a third-party defendant? To the extent that the 402A defendant is permitted contribution from a negligent third-party defendant, the sting of liability imposed on the marketer will be diminished and so, too, will the stimulus to market a non-defective product. Presumably, that dilution of the conduct-regulating purpose of 402A would be as undesirable, from the perspective of society generally, in circumstances where the marketer's liability is diminished by the contribution of a negligent third-party defendant as it would be were the dilution the result of the plaintiff's contributory negligence. Corroboration for that conclusion may be drawn from another, admittedly rough,

39. In such circumstances, an appropriate admonition should be given to the jury. According to the Federal Rules of Evidence: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." FED. R. EVID. 105. Given the unique capacity of evidence of imbibing to prejudice the jury against the litigant, the court might well consider weighing that potential prejudice against the limited probative value of the evidence. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

analogous area. In *Wessel v. Carmi Elks Home, Inc.*,[40] defendant tavern operator had served alcoholic drinks to plaintiffs Rice and Cox. One of the two, while intoxicated, had driven an automobile through the side of a house. One occupant of the house was killed, another injured, and property damages resulted from the accident. Defendant, who was sued under the Illinois Dram Shop Act,[41] in turn, filed a third-party complaint against plaintiffs on a theory of implied indemnity.[42] In dismissing the complaint, the court observed:

> [B]y permitting the extension of the right of indemnity in this case, the public policy expressed in the statute would be frustrated and its disciplinary feature diminished. Absent a clear legislative mandate to the contrary, the cost accruing for a violation of the statute should be borne by those profiting from the sale of liquor to the public who enter such commercial enterprises with full knowledge of this attendant liability.[43]

The Dram Shop Act, like 402A, did not require negligence as a condition precedent to the imposition of liability. Like 402A, it was deemed to have a "disciplinary feature,"[44] presumably aimed at having the defendant feel the sting of liability, at least in part for the purpose of stimulating the defendant toward heightened circumspection. Permitting the defendant to dilute liability would frustrate the public policy underlying 402A as it would the policy underlying the Dram Shop Act. From the plaintiff's perspective, denying the 402A defendant contribution from a negligent third-party defendant is hardly likely to result in economic jeopardy; had plaintiff considered that negligent actor an appropriate defendant, plaintiff would have sued both the 402A defendant and the negligent actor. It is only after the plaintiff sues the 402A defendant (and not the negligent actor) that the defendant's right to implead the negligent actor as a third-party defendant will be asserted. Moreover, it seems unlikely that extending immunity from contribution to the negligent third-party defendant will have an adverse impact on potential deterrence of such negligent conduct. So long as the

40. 54 Ill. 2d 127, 295 N.E.2d 718 (1973).
41. ILL. REV. STAT. ch. 213, § 135 (1967).
42. 54 Ill. 2d at 128, 295 N.E.2d at 719.
43. *Id.* at 131-32, 295 N.E.2d at 721.
44. *Id.*

negligent actor is vulnerable to liability as the result of direct suit by the injured plaintiff, the conduct regulation arising out of possible liability would be preserved.

There is one major area in which (1) plaintiff is unable to sue the negligent actor, so that, if the 402A defendant is precluded from seeking contribution from the negligent actor, there will be no threat of tort liability to influence the conduct of that actor, and (2) the likelihood of a 402A action is substantial. The area is that of work-connected injuries where the exclusivity clause[45] of a state's workmen's compensation statute prohibits plaintiff from bringing an action against his employer. If plaintiff sustains a work-connected injury and sues a 402A defendant (the manufacturer of the injury-producing machinery, for example), should that 402A defendant be permitted to seek contribution from the employer as a third-party defendant?

In most jurisdictions, the employer, even if negligent, enjoys immunity from such impleader as a result of decisions interpreting the exclusivity clauses as prohibiting any defendant, whether or not a 402A defendant, from seeking contribution from the employer.[46] In a minority of states, however, impleader is permitted but usually the employer's liability is limited to that provided for in the workmen's compensation statute.[47] In those states applying that minor-

45. *See, e.g.*, PA. STAT. ANN. tit. 77, § 481(a) (Purdon 1974).

46. 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 76.21 (1976) [hereinafter cited as LARSON] (citations omitted) states:

> The great majority of jurisdictions have held that the employer whose concurring negligence contributed to the employee's injury cannot be sued or joined by the third party as a joint tortfeasor, whether under contribution statutes or at common law. The ground is a simple one: the employer is not jointly liable to the employee in tort; therefore he cannot be a joint tortfeasor.

47. LARSON, *supra* note 46, at § 76.22. Larson included within the minority jurisdictions Pennsylvania, North Carolina, and California. According to Larson, Pennsylvania "produced a series of cases allowing the third-party action over against the employer in contribution—but it has also arbitrarily limited the amount of contribution to the amount of the employer's compensation liability." In North Carolina and California, "when the employer's negligence contributed to the injury, the employee's third-party recovery is merely reduced by the amount of compensation." *Id.* "In North Carolina, the reduction applies when there is an actively negligent employer." *Id.* at n.10. The economic consequences under the Pennsylvania rule and the North Carolina rule are the same. *Id.* at § 76.22.

By legislative enactment, Pennsylvania has moved from the minority to the majority view, granting the negligent employer total immunity from contribution liability. PA. STAT. ANN. tit. 77, § 481(b) (Purdon 1974). "Prior to February 5, 1975, Pennsylvania law permitted a third party sued by an injured employee to obtain contribution or indemnity from the employer to the extent of the latter's statutory compensation limits. . . . However on that date

ity view, should the employer be available as a third-party defendant to a 402A defendant?

Before attempting a direct answer to that question, it may be appropriate to examine the economic consequences flowing from the majority and minority views, without explicit application to a 402A defendant. Under the majority view, the employer, immune from impleader, faces no possibility of tort liability and possesses a significant opportunity to recapture any workmen's compensation benefits paid to employee should employee recover in a tort action against a (third-party)[48] defendant.[49] To make the economics more apparent, it may be helpful to assign arbitrary dollar values to the workmen's compensation benefits and to plaintiff-employee's tort action. Assume that employer has paid employee $3,000 in workmen's compensation benefits and that plaintiff-employee's tort action against defendant results in a $30,000 judgment. Employer recovers from employee the $3,000 workmen's compensation benefits, a recapture provision apparently resting on the dual bases that plaintiff should not receive duplicative damages and that the culpable defendant rather than employer should bear the economic consequences of the employee's injury. The ultimate dollar resolutions are these: plaintiff keeps $30,000, legally liable defendant pays

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P.L. No. 263, 77 P.S. § 481(b) became effective." Brescia v. Ireland Coffee-Tea, Inc., 412 F. Supp. 488, 489 (E.D. Pa. 1976). In *Brescia,* the court concluded that § 481(b) was to be applied prospectively only.

New York has a judicially fashioned law which permits the defendant, including a product liability defendant, to implead the negligent employer and then, given a verdict for plaintiff, permits the jury to apportion damages between original defendant and impleaded employer on the basis of the relative culpability of each, without limiting the employer's liability to its workmen's compensation exposure. Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). For a case combining the New York rule permitting the product liability defendant the contributory negligence defense, Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), see note 13 *supra. See* Merced v. Auto Pak Co., 533 F.2d 71 (2d Cir. 1976). It seems to me that both *Codling* and *Dole* unduly dilute the liability sting intended to motivate the seller to market a defect-free product. For an exposition of the view that the 402A defendant should be permitted contribution from the culpable third-party employer and that the apportionment of damages between them should be based on their relative culpability, see Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident,* 14 DUQ. L. REV. 349, 368, 389 (1976).

48. I have used the phrase "third-party defendant" to refer to the original defendant sued in tort by plaintiff-employee only because the courts regularly use the phrase to indicate that the defendant is an entity other than the immune employer. However, to avoid confusion between original defendant and impleaded third-party defendant-employer, only the impleaded party will be referred to as third-party defendant hereinafter.

49. *See, e.g.,* PA. STAT. ANN. tit. 77, § 671 (Purdon 1972).

$30,000, and employer pays nothing. In those states which permit the defendant to implead the negligent employer but limit the employer's contribution to the limit of its workmen's compensation liability, assuming that defendant secures a judgment for contribution from third-party defendant-employer, plaintiff will receive $30,000, defendant will pay $27,000, and employer will pay $3,000.[50] In effect, employer will have lost its right to recapture workmen's compensation benefits and the original defendant will be required to pay plaintiff the judgment amount less the workmen's compensation benefits. Apparently, those jurisdictions applying this minority view accomplish two purposes: the original defendant enjoys a partial diminution of liability because of employer's contributing negligence and employer is faced with partial liability, perhaps enough to influence the employer toward greater care in providing a safe working place.

Where the original defendant is a 402A defendant, an obvious conflict arises because of the significant conduct-regulating purpose of 402A to stimulate the seller to market a defect-free product. To the extent that the 402A defendant may receive contribution from third-party defendant-employer, the liability-generated stimulus will be diminished. Yet, in those jurisdictions permitting defendants generally to implead the culpable employer (albeit with a limited liability exposure), there is a corollary aim to stimulate third-party defendant-employer to provide a safe working place. How should the conflict be resolved?

Even accepting as equitably sound the general rule that one tortfeasor should have contribution from another tortfeasor, it remains appropriate to emphasize the unique capacity of the 402A defendant to market a defect-free product and the stimulus through the sting of liability which 402A contemplates as a means of inducing greater care by the manufacturer. In effect, that significant purpose of 402A implies that the 402A defendant should not be able to diminish that liability through impleader, even of a culpable employer.

But what of the culpable employer, immune from direct suit by plaintiff-employee because of the workmen's compensation statute's exclusivity clause, and intended to be influenced by a limited

50. Those ultimate economic consequences would be the same under the procedure followed in Pennsylvania prior to the enactment of § 481(b), and those applied in California and North Carolina. *See* note 47 *supra*.

liability as third-party defendant? If the 402A defendant is deemed incapable of impleading the employer, will not the conduct-regulating function contemplated by those jurisdictions applying the minority rule be frustrated? Yes, it will. Does that mean that, in those jurisdictions embracing the minority rule, the culpable employer should be available as a third-party defendant to the 402A defendant? I think not. The basic tort immunity given employer is the product of a legislative determination manifested in the workmen's compensation law. Even the minority view that employer may be impleaded as a third-party defendant is the product of a judicial determination that such limited contribution liability has not been precluded by and is not inconsistent with that workmen's compensation law. Therefore, in those jurisdictions permitting such impleader, that determination is an essentially legislative decision contemplating the relationship between the general defendant and the employer as third-party defendant. When, however, the highest appellate court of the state embraces 402A, it does at least two things: it acts with specific reference to the product liability defendant and it acquiesces in 402A's implicit determination that the full sting of liability is an appropriate means of influencing the defendant to market a defect-free product. The decision to adopt 402A and the significance of 402A's conduct-regulating purpose suggest that that purpose should prevail over the more general legislative decision that, generally and without specific reference to a 402A defendant, the culpable employer should be available as a third-party defendant to the original defendant. Consequently, I would conclude that, even in those jurisdictions which hold the culpable employer vulnerable to limited contribution, the employer should not be available as a third-party defendant to the 402A defendant.

Clearly, a state legislature finding that judicial conclusion unsatisfactory would be able to override it by legislative enactment. A state legislature, sensitive to maintaining some degree of conduct regulation over employers through vulnerability to liability, would recognize that prohibiting the 402A defendant from impleading the employer would impede that regulation. The basic course of action for the legislature would be to follow one of these alternatives: accept the judicial decision that the conduct-regulating function of 402A is sufficiently significant to justify immunizing the employer from partial contribution, even at the price of sacrificing the regulation of employer conduct; override that judicial decision by a statute which exposes the employer to such partial contribution to a

402A defendant, thus infringing the conduct-regulating function of 402A; or accept the judicial decision and fashion a different mode of encouraging employer sensitivity to employee safety. It seems to me that the third alternative would be the most desirable and that enlarging workmen's compensation benefits generally[51] would be an efficient method of accomplishing that alternative. Substantially enlarged workmen's compensation benefits would tend to stimulate all employers toward greater sensitivity to employee safety. Economics would dictate that greater care toward assuring a safe working place would be good business practice for all employers, whether or not employee tort actions growing out of work-connected injuries seemed likely and, if so, whether or not such tort actions against 402A defendants seemed likely. In addition, of course, the enlarged workmen's compensation benefits would assure that the employee who sustained a work-connected injury would come closer to being made economically whole even absent a feasible tort defendant, and that seems inherently desirable.

There has been an effort to persuade Congress to take legislative action in this area.[52] The thrust of the effort has been directed to-

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51. Pennsylvania's statute provides an example of present workmen's compensation benefits:

> For total disability, sixty-six and two-thirds per centum of the wages of the injured employe as defined in section three hundred and nine beginning after the seventh day of total disability, and payable for the duration of total disability, but the compensation shall not be more than the maximum compensation payable nor less than fifty per centum of the Statewide average weekly wage. If at the time of injury, the employe receives wages equal to or less than fifty per centum of the Statewide average weekly wage, then he shall receive ninety per centum of his average weekly wage as compensation, but in no event less than thirty-three and one-third per centum of the maximum weekly compensation payable. Nothing in this clause shall require payment of compensation after disability shall cease.

PA. STAT. ANN. tit. 77, § 511 (Purdon 1974). For a schedule of compensation payable for loss of various body members, see PA. STAT. ANN. tit. 77, § 513 (Purdon 1974).

52. S. 3317, 94th Cong., 2d Sess. (1976) states:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 4(b) (4) of the Occupational Safety and Health Act of 1970 is amended by adding at the end thereof the following new proviso: "*Provided,* That in any case where an employer's failure to comply with any provision of this chapter or any standard promulgated thereunder or to comply with any State statutory, administrative, or common law requirement relating to industrial safety causes or contributes to an accident resulting in bodily injury, no provision of any workers' compensation law or similar State statute shall be construed to bar an action or third-party complaint for contribution or indemnification or other relief in the nature thereof under an otherwise applicable statute or principles of common law against such employer by a person liable or alleged to be liable for such injury or to

limit recovery in any such action; nor in any action by an employer for subrogation under a workers' compensation law or similar State statute shall the defendant be prevented from raising as a defense the employer's contributory fault where such fault involves failure to comply with the Occupational Safety and Health Act or any standard promulgated thereunder or failure to comply with any State statutory, administrative, or common law requirement relating to industrial safety."

S. 3317 was introduced by Senators Taft, Domenici, Griffin, Nelson and Randolph. It was referred to the Committee on Labor and Public Welfare and was not reported out of that committee.

In the present session of Congress, a considerably different approach has been taken in a Senate proposal "authorizing the Small Business Administration to furnish reinsurance for property liability insurers for small business concerns which would not otherwise be able to obtain product liability insurance on reasonable terms":

Be it enacted by the Senate and House of Representatives . . ., That section 7 of the Small Business Act is amended by adding at the end thereof the following new subsection:

(1) (1) The Administration is authorized to offer to any insurer or pool reinsurance against excess losses resulting from product liability claims or completed operations claims, and for such purpose the Administration is authorized to enter into any contract, agreement, or other arrangement with any insurer or pool for reinsurance coverage, in consideration of payment of such premiums, fees, or other charges by such insurers or pools which the Administration deems to be adequate to obtain aggregate reinsurance premiums against the anticipated amount of losses reinsured against hereunder, taking into account the need to make product liability insurance available to small business concerns at reasonable rates. No such contract, agreement, or other arrangement may impose any obligation on the Administration for reinsurance for any claim arising on or after October 1, 1980.

(2) Reinsurance offered under this subsection shall reimburse an insurer or pool for all or part of its total proved and approved claims for covered losses resulting from product liability claims during the term of the reinsurance contract, agreement, or other arrangement, in excess of the amount of the insurer's or pool's retention of such losses as provided in the reinsurance contract, agreement, or other arrangement entered into under this subsection. . . .

(3) Reinsurance under this subsection shall only be available to cover excess losses as referred to in paragraph (2) which are attributable to insurance afforded by such insurer or pool to small business concerns as defined by size standards promulgated by the Administration.

(4) In carrying out its functions under this subsection, the Administration is authorized to provide for such limits on liability per occurrence or in the aggregate, premiums, fees, or other charges for reinsurance, to require insurers or pools to furnish such assurances and information, and to undertake such activities as it deems appropriate.

(5) There are authorized to be appropriated such sums as may be necessary to cover reinsurance losses in excess of premiums, fees, or charges received under this subsection.

(6) As used in this subsection, the term—

(A) 'insurer' means any insurance company or group of companies under common ownership which is authorized to engage in the insurance business under the laws of the State;

(B) 'pool' means any pool or association of insurance companies or any State-supervised assigned risk pools, joint underwriting authority, or residual risk mechanism which is formed, associated, or otherwise created for the purpose of making product liability insurance more readily available to small busi-

ward congressional legislation which would afford 402A (and other) defendants the opportunity to implead employers as third-party defendants, thus overriding the workmen's compensation statutes in the majority of states which prohibit impleader, and which would impose on the third-party defendant-employers contribution liability beyond that now permitted in the minority of states. I have a two-step reaction to that effort to stimulate such congressional action. First, I think that Congress, like a state legislature, should be sensitive to the conflicting conduct-regulating purposes underlying 402A and employer liability. And, with Congress no less than with a state legislature, I am inclined to think that the most desirable alternative would be to enlarge substantially the dollar amount of workmen's compensation benefits and hold the employer immune from contribution liability to the 402A defendant. Second, I am inclined toward the view that Congress should be especially circumspect about taking any action in this area. The economic self-interest of potential 402A defendants and the greater feasibility of efficiently lobbying one legislative body as contrasted with fifty legislative bodies are apparent. The existing and suggested law in the area involved, however, is a delicate amalgam of state legislative determinations regarding the degree, if any, to which state employers should be vulnerable to contribution liability, state judicial decisions interpreting those legislative enactments, and state judicial opinions embracing 402A. While the commerce clause [53] may very well provide an appropriate constitutional peg for congressional action affecting the tort liability exposure of employers in work-connected personal injury actions, Congress should be sensitive to the close interrelationship between that general question and the more specific issues of whether 402A should be embraced and, if it is, whether the 402A defendant should have available as a third-party defendant the culpable employer. Unless Congress is willing to act in regard to 402A, its propriety, and its impact on third-party actions against employers, Congress should not enter the area.

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ness concerns eligible for the benefits of reinsurance under this subsection; and

(C) 'excess losses resulting from product liability claims or completed operations claims' means losses resulting from product liability claims under policies for standard lines of product liability insurance for which reinsurance is offered under this subsection.

S. 527, 95th Cong., 1st Sess. (1977). The bill was introduced by Senators Nelson and Culver on January 31, 1977, and was referred to the Committee on Small Business.

53. U.S. CONST. art. I, § 8, cl. 3.

We have concluded that the 402A defendant should not be permitted contribution from a negligent actor in the role of third-party defendant and that such contribution should be denied the 402A defendant against a culpable employer even in those jurisdictions which permit limited contribution against culpable employers by defendants generally. The essential reason for that conclusion is a desire not to dilute the liability sting which 402A contemplates as an effective stimulus to encourage the seller to market a defect-free product. We have noted, too, that, with the exception of the workmen's compensation area and its conflicting conduct-regulating concerns, to extend immunity from contribution as a third-party defendant to a negligent actor is not likely to diminish the deterrent effect of potential liability on the potential negligent actor because the plaintiff can sue that actor directly.

Perhaps we should attempt now to convert that presumed capacity of plaintiff to sue negligent actor into a rational rule of law. If plaintiff is permitted to sue both 402A defendant and negligent actor, and enjoys a recovery from both, the effect of liability on the 402A defendant will be reduced, probably halved. Does that reasoning imply that, in order to assure the imposition of full liability on the 402A defendant, the plaintiff should be precluded from suing the negligent actor? The answer must be no. In denying to the 402A defendant the contributory negligence defense and the right of contribution from a negligent third-party defendant, in order to permit the imposition of full liability on the marketer, only the 402A defendant suffers a deprivation. And, since the victim of that deprivation is precisely the litigant intended to be affected adversely by 402A, the procedural and economic consequences of that deprivation perfectly complement the conduct-regulating function of 402A. To deny the plaintiff the right to sue the negligent actor would be to impose a deprivation on the intended beneficiary of 402A and the injured victim of the defective product. That economic consequence surely was not contemplated by the adoption of 402A. Just as surely it would be inappropriate to penalize the victim of the defective product as a means of assuring the imposition of full liability on the 402A defendant. Therefore, it should be concluded that the plaintiff remains free to sue the 402A defendant and the negligent actor where the conduct of both has combined to produce plaintiff's injury.

Where plaintiff does sue both the 402A defendant and the negligent actor, difficult problems in determining the liability to be im-

posed on each defendant may arise. *Huddell v. Levin*[54] presents a nearly perfect factual setting within which to examine those problems. Dr. Benjamin R. Huddell, a psychiatrist, was driving his 1970 Chevrolet Nova, manufactured by General Motors (GM), when the vehicle ran out of gas and stopped on the highway. A car driven by defendant George Levin in the course of his employment for defendant S. Klein Department Stores crashed into Huddell's car. The impact caused Huddell's head to strike his automobile's head restraint, resulting in brain damage. Huddell died a day later.

The head restraints for the driver and front-seat passenger had been installed as part of the original equipment of the car. Their sole purpose was to prevent rearward rotation of the head and neck in a rear-end collision. Evidence presented at the trial revealed that the head restraints were "designed in such a manner as to expose the rear of the head to a relatively sharp, unyielding metal edge, covered by two inches of soft, foam-like material."[55] The blow to Huddell's head resulted in an " 'extensive fracture' to the occipital region of the skull. Because of a medical phenomenon known as 'countrecoup,' by which the brain of a moving head striking a stationary object sustains injury opposite the point of impact, the frontal portions of Dr. Huddell's brain were extensively damaged . . . ."[56] With the exception of his head, Dr. Huddell sustained only minimal injuries.

Dr. Huddell, who had just completed his residency in psychiatry and had opened an office, was survived by his wife and five children, ranging in age from three to thirteen.[57] The widow brought a wrongful death action against Levin for negligence, against S. Klein under the doctrine of respondeat superior, and against General Motors under 402A. The jury concluded "that Levin was negligent and was acting within the scope of his employment for S. Klein . . . ; that Dr. Huddell's head did strike the head restraint; [and] that the head restraint was defectively and unreasonably dangerous and was a substantial contributing factor of Dr. Huddell's death."[58] The dis-

54. 537 F.2d 726 (3rd Cir. 1976).

55. *Id.* at 731-32.

56. *Id.* at 732.

57. *Id.* at 731-32.

58. *Id.* at 732. The jury concluded that Levin's negligence had not been a proximate cause of decedent's death, *id.*, but the trial court, concluding as a matter of law that the initial collision had been a proximate cause of death, "entered judgment notwithstanding the ver-

trict court entered judgment for the plaintiff and against the three defendants in the amount determined by the jury. On appeal, the Third Circuit, per Judge Aldisert, reversed and remanded for a new trial.

The principal reason for reversal was Judge Aldisert's conclusion regarding the appropriate potential liability of GM. Noting that the case was complicated since GM's liability was predicated on the "second collision"[59] theory, Judge Aldisert determined that the liability of GM, if any, should be limited to the aggravation of injury attributable to the allegedly defective head restraint: "the automobile manufacturer is liable only for the enhanced injuries attributable to the defective product."[60]

> Without proof to establish what injuries would have resulted from a non-defective head restraint, the plaintiff could not and did not establish what injuries resulted from the alleged defect in the head restraint. Without such proof, the jury could not have properly have [*sic*] assessed responsibility against G.M. for the death of Dr. Huddell.[61]

That conclusion imposes upon the plaintiff the affirmative obligation of introducing evidence of the extent of injury which Dr. Huddell would have sustained had the head restraint been non-defective (and, of course, permits GM to offer its own evidence on that point) and extends to the manufacturer a reduction of its liability (if any) in the wrongful death action in the amount of the dollar value of a wholly hypothetical personal injury action growing out of the same collision but supplanting the actual head restraint with a non-defective head restraint.

> Although [plaintiff's expert witness] testified that there was no evidence of significant injury to vital organs from the accident as it happened, this ignored the possibility that injury to those organs might have been more severe if the great forces of

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dict against Levin and S. Klein." *Id.* at 731. "Whether or not Levin was negligent may have been a jury question, but whether or not Levin was causally responsible for Dr. Huddell's death is hardly a matter on which reasonable men could disagree." *Id.* at 739.

59. *Id.* at 737. A further complication was that although New Jersey's law was applicable in this diversity case, the court was "without the specific guidance of viable New Jersey precedents." *Id.* at 733.

60. *Id.* at 738.

61. *Id.*

the collision had been more widely distributed over the head and body by an alternate head restraint design. It was not established whether the hypothetical victim of the survivable crash would have sustained no injuries, temporary injuries, permanent but insignificant injuries, extensive and permanent injuries, or, possibly paraplegia or quadriplegia.[62]

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62. *Id.* After initially contemplating *Huddell,* I was uncertain (and, as it turned out, wrong) about the thrust of Judge Aldisert's opinion. I wrote to Judge Aldisert seeking guidance and, with unique and characteristic graciousness, Judge Aldisert replied. In addition, Judge Aldisert was kind enough to permit me to share his response with my Torts class and, more recently, generously consented to have the letters included herein.

October 29, 1976

Hon. Ruggero J. Aldisert
United States Circuit Judge
United States Court of Appeals for
the Third Circuit
Federal Building
Pittsburgh, Pa. 15222

Re: Huddell v. Levin
537 F.2d 726

Dear Rugi,

I've read, re-read and ruminated the opinions in the above case and still have the uneasy feeling that I must be missing something. When eminent jurists like you and Judge Rosenn have both devoted your attention to a legal issue and I still can't pick up the thread, I know the fault must be mine.

To my simple mind, it would appear that findings that Levin's negligent driving, in the scope of his employment for S. Klein, and GM's defective head restraint had together occasioned Dr. Huddell's death, would justify imposing on the three defendants total liability in the wrongful death action ($2,024,700).

I can, however, understand your contrary view that GM is to be liable "only for the enhanced injuries attributable to the defective product." But that, in turn, confronts me with a problem I cannot resolve.

Your opinion indicates that plaintiff must present "proof to establish what injuries would have resulted from a non-defective head restraint." If that is done and the proof indicates that "the hypothetical victim of the survivable crash would have sustained . . . paraplegia," what is plaintiff to recover from GM?

The inference I draw from the opinion is that plaintiff would recover from GM the dollar value of a wrongful death action arising out of the death of a hypothetical Dr. Huddell afflicted with paraplegia. Can that be correct? And, if so, is there not a substantial risk that that wholly hypothetical evidence will be not only extraordinarily difficult to produce but, as well, uniquely confusing to a jury which, presumably, will be required to hear evidence of the dollar value of the real wrongful death action in order to determine the damages to be imposed on Levin and S. Klein?

I know how extraordinarily heavy your work schedule is and it is not my intention (honest) to impose on you the additional burden of showing me the path to truth and light in this case. But, when, as and if circumstances permit, your guidance would be much appreciated.

Reading your opinions continues to be a delight. They are invariably thorough,

beautifully written and (obviously in this instance) stimulating and provocative.

Stay well.

Respectfully and sincerely,
(Signed) David
David E. Seidelson
Professor of Law

DES/is

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RUGGERO J. ALDISERT
CIRCUIT JUDGE

FEDERAL BUILDING
PITTSBURGH, PA. 15222

November 12, 1976

Professor David E. Seidelson
Professor of Law
The George Washington University
Washington, D.C. 20052

Re: Huddell v. Levin, 532 F.2d 726

Dear David:

With your usual acumen you have zeroed in on one of the most difficult aspects of an extremely difficult case. At the time I circulated the draft opinion among the members of the court I said that, considering my fifteen years of practicing law in Pittsburgh—in which a goodly portion was tort work—and considering also my eight years on the Court of Common Pleas during which I handled settlement conferences in 5,000 tort cases as calendar control judge in a two-year period, and considering also my then eight years on this court, I found the Huddell case to be the most difficult tort case I have ever handled.

You will recall that I began the discussion in the opinion by saying: "This troublesome case, implicating nascent concepts of state tort liability, demonstrates again the impracticality of the federal diversity forum in the twentieth century and underscores the necessity for congressional action so eloquently sounded by the Chief Justice in his annual report on the state of the judiciary." I shudder at the spectre of plaintiffs' lawyers rushing into federal court to experiment with new notions of tort law in diversity when, in fact, they should be in the state court systems. For it is there where the great new developments are taking place. We are, perforce, too conservative.

This case was difficult. The precise question you raise, to-wit, the comparison of a wrongful death verdict and paraplegia, demonstrates the metaphysical aspects of tort litigation where, as here, the plaintiff had a deliberate purpose in doing what he did. The plaintiff's lawyer had a case with excellent damages. He had clear liability on the part of the active tortfeasor, Levin, and Levin's employer, S. Klein's Department Store. But being a good plaintiff's lawyer, he also built a case against General Motors on the theory of "enhanced injury" or "second collision." Unfortunately, the formulation of this theory of liability or "crashworthiness" has emerged in the federal courts in a diversity context with federal judges guessing what the state supreme courts would do. But the theory is hypothesized that the manufacturer is liable only for the "enhanced injury."

In order to pin responsibility on General Motors from both a *liability* and damage standpoint, the plaintiff was extremely meticulous in proving that the collision alone would not have killed the plaintiff's decedent. Experts were then presented who testified that the plaintiff's decedent would have survived. (Now plaintiff is hoisted on her own petard.) The theory of the plaintiff's case is (1) to prove the extent of the injuries plaintiff's decedent would have received had not the intervention of the defective headrest occurred and (2) show the extent of the final injuries. If this be the

Judge Rosenn concurred in the conclusion that GM's liability should be limited to the aggravation of injury attributable to the defective head restraint, but disagreed with the court's imposing on the plaintiff the burden of proving the extent of injuries which would have been sustained by Dr. Huddell had the head restraint been non-defective. Judge Rosenn would have imposed that difficult burden of proof on defendants.[63]

I find myself in the concededly uncomfortable position of disagreeing with both Judge Aldisert and Judge Rosenn. There is always some degree of awkwardness inherent in diverging from the conclusions achieved by judges who have focused their attention and competence on a particular legal issue; when the judges are as extraordinarily competent as Judge Aldisert and Judge Rosenn, that awkwardness becomes downright discomfiture. Still, the disagreement is there and it rests on several bases.

First, pursuant to Judge Aldisert's opinion, at retrial plaintiff will be required to introduce evidence of the nature and extent of the injuries which a hypothetical victim with a non-defective head restraint would have sustained. Putting aside the difficulties in securing and introducing such purely hypothetical evidence, it seems fair to assume that plaintiff's evidence will indicate that only relatively insignificant injuries would have been sustained by that hypothetical victim. But, of course, GM will have to be given an opportunity

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theory—and I accept it as a viable one—then the only responsibility on the manufacturer is for the difference between wrongful death and the injuries that would have been caused by the collision without a defective headrest.

I agree with you completely that there is "a substantial risk that wholly hypothetical evidence will be not only extraordinarily difficult to produce but, as well, uniquely confusing to a jury." But such is the peculiar nature of this jural beast. Experts will take the stand and with a straight face opine that where a stopped car is struck from the rear by another automobile, admittedly going at a speed of from 50 to 60 miles an hour at the point of collision, compressing the struck car five feet, the occupant only sustained minor injuries, and that the serious injury took place when the occupant's head struck GM's head restraint. You must understand the hypothetical state in which these cases do get to the jury. Hypotheses from expert witnesses create metaphysics in the law.

I am not sure that I have helped you any. I end as I began, this was the most difficult tort case to which I have ever been exposed. It illustrates that when an extremely able advocate expounds an exciting theory in order to achieve a very practical result, those of us who must weave a theoretical web of law from it have our work cut out for us.

With every good wish, I am,

Your friend,
(Signed) Rugi

63. *Id.* at 747.

to present controverting evidence on that point, and it seems fair to assume that GM's evidence will indicate that the hypothetical victim would have sustained severe and permanent injuries, perhaps even quadriplegia.The jury will then be required to make a factual determination and assign a dollar value to the hypothetical victim's injury. Let's assume that the jury accepts GM's evidence and concludes that the hypothetical victim would have been left a quadriplegic. In determining the dollar value of the personal injury action, presumably the jury will take into account the mental anguish which that victim would have sustained over his life expectancy as well as the cost of continuing medical care. It is quite possible that the jury could assign a greater dollar value to the hypothetical personal injury action than it assigns to the actual wrongful death action. In that event, notwithstanding a second jury determination that the head restraint was defective and a substantial cause of Huddell's death, GM would escape liability entirely. Such a result, it seems to me, would elicit a high degree of moral revulsion. It would imply the grotesque conclusion stated by one of my Torts students that "GM had done Dr. Huddell a favor by killing him." It seems to me that a court should, if possible, avoid fashioning a rule of law having the capacity to invite such an inference.

Were Judge Rosenn's conclusion applied, plaintiff would have no affirmative obligation to introduce evidence of the injuries which the hypothetical victim would have sustained. However, GM would be required to introduce such evidence to diminish or avoid liability entirely, and again it seems fair to assume that such evidence would indicate that the hypothetical victim would have sustained severe and permanent injuries, perhaps quadriplegia. Plaintiff, then, would feel compelled to introduce rebuttal evidence indicating that the hypothetical victim would have sustained only relatively insignificant injuries. Once more the jury would be required to make a factual determination of the severity of the injuries the hypothetical victim would have sustained and to assign a dollar value to the hypothetical personal injury action. Should the jury accept GM's evidence, the possibility exists that the dollar value of the hypothetical personal injury action may exceed the dollar value of the wrongful death action and GM would escape any liability, notwithstanding a jury determination that the defective head restraint was a substantial cause of Dr. Huddell's death. The moral revulsion at the grotesque conclusion implied would be precisely the same.

Next, Judge Aldisert's requirement that plaintiff introduce evidence of the nature and extent of the injuries which would have been sustained by the hypothetical victim and his invitation to defendant to introduce evidence on the same point seems to me to create an enormously complicated task for the jury. Once the jury is required to assign a dollar value to the hypothetical personal injury action, as it is by the Third Circuit's opinion, plaintiff and GM are placed in the position of introducing appropriate evidence to enable the jury to perform that function. Typically, compensation for pain, suffering, and mental anguish comprises a substantial portion of the damages awarded in a personal injury action. Plaintiff and, even more significantly, GM (the litigant desirous of achieving a high dollar value for the hypothetical personal injury action, since that amount will be deducted from the dollar value of the wrongful death action in determining its liability, if any) will be faced with the chore of adducing evidence of the mental anguish which would be endured by a quadriplegic with a wife and five children over the period of his life expectancy in circumstances in which the victim is a creature of fiction who has not in fact sustained any mental anguish. And the jury, after hearing that evidence, will be required to place a dollar value on that mental anguish.

I think most trial lawyers would agree that one of the most difficult litigation tasks is that of dealing with the dollar value of pain, suffering, and mental anguish in a manner which will be significant, efficient, and helpful to a jury in a personal injury action in which there is a real plaintiff. When there is no real plaintiff and both the past and future suffering are wholly hypothetical, counsel's task, and therefore the jury's function, become inordinately difficult. When that difficulty arises in a wrongful death action, counsel will be required to demonstrate, *inter alia,* how long the actual decedent would have lived had he been permitted to enjoy his normal life expectancy, how much the actual decedent would have earned during that life expectancy, what portion of those earnings would have been required to sustain decedent during that life expectancy, and what portion of those earnings would have been received by the dependent survivors. In addition, the jury will be required to determine the manner in which those dollar figures are to be reduced to present value, based on expert, and probably conflicting, testimony as to the continuation of an inflationary economic spiral. All of that evidence will be necessarily speculative to some extent, as it always is in wrongful death actions. It seems unfortunate to complicate the necessarily difficult and unavoidably speculative determinations

imposed on jurors in a wrongful death action by asking them to determine the dollar value of a personal injury action which never existed in fact.

Under Judge Rosenn's view, GM would have the burden of introducing evidence of the consequential damages which a hypothetical victim would have sustained if the manufacturer wished to diminish or avoid its liability in the wrongful death action and plaintiff would presumably feel compelled to introduce rebuttal evidence of much lower consequential damages. The ultimate result, from the perspective of the jury, would be precisely the same as it is under the court's view: the jury would have the necessarily difficult determinations associated with the actual wrongful death action exacerbated by the additional obligation of computing the dollar value of the consequential damages in the wholly hypothetical personal injury action.

Next (and intimately related to the preceding two considerations), the plaintiff, pursuant to Judge Aldisert's opinion, will be required to present evidence that, given a non-defective head restraint, the driver would have survived; then plaintiff will be required to introduce evidence sufficient to enable the jury to place a dollar value on that hypothetical personal injury action. GM will then be given the opportunity to present its controverting evidence. If the jury ultimately concludes that the head restraint was defective and a substantial cause of Dr. Huddell's death, it will then be required to place a dollar value on the hypothetical personal injury action, place a dollar value on the actual wrongful death action, and then deduct the former figure from the latter in determining what liability, if any, is to be imposed on GM. In addition to the grotesque complications inherent in performing the necessary arithmetic calculations, there is a troubling metaphysical aspect to the jury's function. In effect, the jury will be required to compare the dollar value of the continuing life of the injured and perhaps permanently and seriously impaired hypothetical victim and the dollar value of the wrongful death action to the actual deceased victim's dependent survivors. Such a comparison might serve as a stimulating leitmotif for the next Saul Bellow novel, but it seems an agonizing and soul-searching task to impose on a jury. Were Judge Rosenn's views applied, the ultimate impact would be the same. Ultimately the jury would have imposed on it that awful ontological burden: comparing the dollar value of the personal injury action of a hypothetical plaintiff, perhaps permanently and severely im-

paired, with the dollar value of the prematurely terminated life of the actual decedent to his dependent survivors.

If such a task were absolutely essential to determine the injured plaintiff's right to recover vel non and, if so, the amount of recovery, the peculiarly searing and enervating responsibility imposed on the jury would be palatable. But it really is not necessary. The district court presented an apparently rational alternative: if Levin's negligence in the scope of his employment for S. Klein and GM's defective head restraint were both substantial causes of Dr. Huddell's death, plaintiff has the right to a full recovery in the wrongful death action against all three defendants. The responsibility imposed on the jury would also be palatable if such a task were absolutely essential to preserve the economic integrity of a defendant whose conduct may have been free of liability-generating characteristics. But, again, it is not necessary. The district court imposed liability on GM on the basis of a factual determination that it had marketed a defective head restraint which was a substantial cause of Dr. Huddell's death.

Each of those troubling aspects of the Third Circuit's opinion, the macabre implication that GM may have done Dr. Huddell a service by killing him, the acute exacerbation of the already difficult determinations imposed on a jury in a wrongful death action, and the uniquely metaphysical nature of the comparative determinations required, is intimately related to the others and to the fact that *Huddell* was a wrongful death action. There is one additional aspect of the opinion which troubles me.

The conclusion of both Judge Aldisert and Judge Rosenn that GM's liability, if any, is to be limited to the aggravation of injury occasioned by the allegedly defective head restraint is troubling because of the nature of the product. The head restraint was, after all, specifically intended to minimize injury. If, because of its defectiveness, it not only failed to fulfill its purported purpose but in addition contributed to the death of the intended beneficiary, should its manufacturer be "rewarded" by either reduced liability or no liability at all because a non-defective head restraint, although saving the beneficiary's life, would have occasioned personal injuries?

If Dr. Huddell's death had been contributed to by a defectively mounted engine, and the theory of liability asserted against GM had been that of "second collision," it might be less offensive to afford GM the opportunity of limiting or avoiding entirely liability in the

wrongful death action based on the nature and extent of the injuries which a hypothetical victim in a similar car with an engine mounted in a non-defective manner would have sustained. The engine, however mounted, is essential to the mobility of the vehicle. It is there to move the car. That is its primary function as intended by the manufacturer and understood by the user. The head restraint, however, was not essential to the vehicle's mobility; the basic function of the vehicle can be performed as efficiently without the head restraint as with it. The head restraint was there for one purpose—to minimize injuries in the event of such a collision. That is its function as intended by the manufacturer and as understood by the user. If, because of its defectiveness, the head restraint frustrated the expectations of manufacturer and user by aggravating rather than minimizing the injuries sustained, the imposition of liability for the totality of the injuries sustained on the 402A defendant would seem entirely appropriate. That liability would effectuate the underlying purpose of 402A to stimulate the defendant to market a defect-free product. If the 402A defendant enjoys diminished liability or no liability at all, depending on the severity of the injuries which a driver advantaged by a non-defective head restraint would have sustained, the contemplated stimulus would be diminished or eliminated. In fact, as the criticality of the injury-minimizing device increased—in terms of predictable injuries ensuing even with a defect-free device—the liability stimulus would decrease. Given a product intended to be life-supporting even in circumstances where serious injury was contemplatable, applying the Third Circuit's opinion, there would be relatively little economic stimulus for the manufacturer to market a defect-free product. Such a result is inconsistent with the conduct-regulating purpose of 402A.

From the facts of *Huddell,* I would draw two legal conclusions, both inconsistent with the Third Circuit's decision, but each apparently consistent with the judgments entered by the district court. First, in a wrongful death action in which the conduct of the negligent defendant and the defective and unreasonably dangerous product of the 402A defendant both are substantial contributing causes of decedent's death, the 402A defendant as well as the negligent actor should be liable in the full amount of the wrongful death action judgment. Second, in any action in which the conduct of the negligent defendant and the defective and unreasonably dangerous product of the 402A defendant are substantial contributing causes of plaintiff's total injuries, and the defective product was intended

to be injury-minimizing, the 402A defendant as well as the negligent actor should be liable for the totality of the injuries sustained by plaintiff, even though the theory of liability asserted against the 402A defendant is that of "second collision."

There remains one facet of the relationship between 402A defendant and negligent actor which should be examined. We have concluded that the 402A defendant should be denied the capacity to implead the negligent actor for the purpose of seeking contribution. We have also determined that the plaintiff should be permitted to sue both 402A defendant and the negligent actor. Those two conclusions give rise to this issue: If plaintiff elects to sue only the 402A defendant, should that defendant be permitted to join the negligent actor, not for the purpose of seeking contribution, but on the assertion that the negligent actor is alone liable to plaintiff? Under the Federal Rules of Civil Procedure,[64] such joinder (or impleader) is unavailable to defendants generally; however, it is available to defendants pursuant to the procedural rules of some states.[65] In those

64. According to FED. R. CIV. P. 14(a):

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or a part of the plaintiff's claim against him.

If plaintiff were to elect to sue only the negligent actor, permitting that defendant to implead the 402A seller as a third-party defendant vulnerable to contribution, it certainly would do nothing to frustrate the sting of liability contemplated by 402A. If the jury found for plaintiff and against (negligent) defendant and for defendant and against third-party (402A) defendant, the 402A seller would feel the sting of partial (contribution) liability which would more efficiently serve the conduct-regulating function of 402A than no liability at all, the result of denying the negligent actor the right to implead the 402A seller. Plaintiff's decision to sue only the negligent actor might suggest a plaintiff decision that either a legally sufficient case could not be made against the 402A seller or the 402A seller is judgment proof. Permitting the negligent actor contribution from the 402A third-party defendant in those circumstances would result in either the imposition of a partial, rather than no, liability sting on the 402A seller or the shifting to the negligent actor of the risk of the 402A litigant's lack of financial responsibility. Neither of those results would frustrate the conduct-regulating function of 402A.

65. *See, e.g.*, PA. R. CIV. P. 2252(a):

> In any action the defendant . . . may, as the joining party, join as an additional defendant any person whether or not a party to the action who may be alone liable or liable over to him on the cause of action declared upon by the plaintiff or jointly or severally liable thereon with him.

In those jurisdictions permitting the original defendant (negligent actor) to join an additional defendant (402A seller) on the ground of sole liability to the plaintiff, the original defendant would be given a psychologically facilitated opportunity to demonstrate to the jury that additional defendant alone should be liable to the plaintiff. Assuming a judgment-proof

states where such joinder is generally available, should it be available to the 402A defendant?

It may be helpful in attempting to answer that question to determine precisely what is accomplished by such joinder. The most obvious result is that it places all interested parties before the fact finder. From the point of view of the original defendant (our 402A defendant), the significance of that is apparent. The 402A defendant is given an opportunity to demonstrate that another defendant (our negligent actor) was alone culpable and should be alone liable. That demonstration may be facilitated psychologically if the jury has before it that negligent actor as an additional defendant upon whom to impose liability. Absent that additional defendant, a jury determination exculpating the 402A defendant would compel a verdict against the injured plaintiff, even if the jury determined that the negligent (but absent from the trial) actor's conduct had caused the plaintiff's injury. The jury is not faced with this dilemma where the negligent actor is before the jury as an additional defendant and therefore vulnerable to a verdict for the plaintiff. Consequently, from the perspective of the 402A defendant, the principal advantage in being able to join the negligent actor as additional defendant on the ground that he alone should be liable is the opportunity of overcoming a feared jury sympathy for the injured plaintiff. Is there any inconsistency between affording the defendant that opportunity and section 402A?

I have emphasized the conduct-regulating function of 402A. But that function is directed toward encouraging the seller to market a defect-free product. If the 402A defendant's product was not defective and unreasonably dangerous, or did not in fact contribute to plaintiff's injury, the liability sting of 402A would be misdirected as to that defendant. Affording that defendant every legitimate opportunity to remove itself from the class intended to be affected by 402A, including the opportunity of overcoming feared jury sympathy for the injured plaintiff, does not frustrate 402A's purpose. Consequently, I would conclude that, in those jurisdictions in which

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additional defendant, the original defendant would have the opportunity to counter plaintiff's effort to recover from a financially responsible (but arguably not negligent) original defendant because of the absence of any other potentially liable litigant. Neither of those opportunities infringes the conduct-regulating function of 402A and both should be deemed appropriate in those jurisdictions permitting the joinder of an additional defendant on the ground of sole liability.

defendants generally may join an additional defendant on the ground that he alone is liable to the plaintiff, the 402A defendant should be afforded the same opportunity with regard to the negligent actor. If it is afforded the 402A defendant in the state court but denied it in the federal court, and diverse citizenship exists as between plaintiff and 402A defendant, it becomes obvious that the defendant's procedural capacity to join the negligent actor on the ground that he alone is liable will depend upon the forum. If plaintiff elects to sue in the state court and the 402A defendant does not remove, the 402A defendant will be able to join the negligent actor on the ground of sole liability. If plaintiff elects to sue in the federal court on diversity grounds, the 402A defendant will be denied the capacity to join the negligent actor on that ground. This apparent inconsistency is explicable in terms of a federal decision that plaintiff should control the choice of litigants except to the extent that an original defendant may have a right to contribution from a third-party defendant. That same difference exists as to all actions, not merely actions against 402A defendants. Since the distinction is not uniquely inappropriate to 402A actions, there would appear to be no reason to assert that the 402A defendant should be denied such joinder in those state courts which permit it.

Suppose that, in a state court which so permits, the 402A defendant joins the negligent actor as an additional defendant on the ground that he alone is liable. If the jury ultimately concludes that plaintiff's injury was occasioned both by the 402A defendant's defective product and the negligent actor's conduct, what then? We concluded earlier that the 402A defendant should be denied contribution from the negligent actor as third-party defendant. Obviously, the 402A defendant should not be permitted to evade that conclusion by reason of its joining the negligent actor on the ground of sole liability and a jury finding of concurrent causation. Therefore, where plaintiff elects to sue only the 402A defendant and that defendant is permitted to join the negligent actor as an additional defendant on the ground of sole liability, a jury finding of concurrent liability should be molded by the court into a judgment for the plaintiff against the 402A defendant alone in the full amount of the damages determined by the jury.

The conclusions achieved in this article as to the legal relationships between the 402A defendant and the negligent actor are connected by a common thread: recognition and maintenance of the stimulus contemplated by 402A to encourage the seller to market a

defect-free product. To the extent that that purpose of 402A is accepted, the plaintiff injured by a defective and unreasonably dangerous product may be more likely to secure compensation and each of us may become somewhat less likely to be injured by a defective and unreasonably dangerous product.